

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT**

**SOUTHWEST PUBLIC POLICY
INSTITUTE,**

Plaintiff,

No. _____

v.

NEW MEXICO DEPARTMENT OF HEALTH,

Defendant.

**COMPLAINT FOR VIOLATION
OF THE INSPECTION OF PUBLIC RECORDS ACT**

COMES NOW, Plaintiff, Southwest Public Policy Institute, by and through its counsel, ARAGON MOSS GEORGE JENKINS, LLP (Jordon P. George), and hereby states the following for its Complaint for Violation of the Inspection of Public Records Act:

PARTIES, JURISDICTION AND VENUE

1. This action relates to Defendant's, the New Mexico Department of Health (*hereinafter*, "DOH"), wrongful denial of Plaintiff's public records request, dated July 19, 2022.
2. This action is brought pursuant to NMSA 1978, Sections 14-2-11 and -12 of the Inspection of Public Records Act ("IPRA"), for actual damages, statutory damages, injunctive relief, costs, attorneys' fees, and to otherwise enforce the provisions of IPRA.
3. Plaintiff, Southwest Public Policy Institute, is a 501(c)(3) nonprofit entity whose principal place of business is in the State of New Mexico.
4. Defendant DOH is a state agency located in Santa Fe, New Mexico.
5. Plaintiff is a proper entity to enforce the provisions of IPRA.
6. This Court has jurisdiction over this matter.

7. Venue is proper in this district.

FACTUAL ALLEGATIONS

8. On July 19, 2022, Plaintiff, through its agent, Patrick Brenner, submitted a written IPRA request to Defendant DOH seeking certain public records in the possession of DOH. *See* E-mail from Patrick Brenner to DOH, dated July 19, 2022, *attached hereto as Exhibit A* (“IPRA Request”).

9. The records sought by Plaintiff pertained to entries in DOH’s “Sweepstakes Opt In,” which were regional and statewide drawings conducted by the New Mexico Lottery Authority (“NMLA”) “for cash prizes to New Mexican residents who have received the COVID-19 vaccine in the State of New Mexico.” *Id.* (citing New Mexico Department of Health, *Sweepstakes Opt In*, GETTHEFACTS.VACCINENM.ORG, <https://getthefacts.vaccinenm.org/sweepstakes/sweepstakes-opt-in/> (last visited Feb 9, 2023)).

10. On July 22, 2022, DOH provided the following response denying Plaintiff’s IPRA Request:

In accordance with the Inspection of Public Records Act §§ 14-2-1 and 14-2-6 (E), protected personal identifiers, including taxpayer identification numbers, financial account numbers, dates of birth and social security numbers and protected health information have been redacted (in whole or in part, in accordance with IPRA) from the responsive materials, resulting in no materials being produced.

In accordance with the Inspection of Public Records Act § 14-2-1 (H), the Health Insurance Portability and Accountability Act and associated regulations, 45 C.F.R. Parts 160 & 164, protected health information and information reasonably believed to allow identification of patients has been redacted from the responsive documents, resulting in no materials being produced[.]

See Letter from Office of General Counsel Chief Records Custodian, Deniece Griego-Martinez, to Patrick Brenner, dated July 22, 2022, *attached hereto as Exhibit B* (“Response”).

11. With the Response, DOH deemed Plaintiff's IPRA Request concluded. *Id.* See **Exhibit A** (e-mail from Deniece Griego-Martinez, dated July 22, 2022).

12. DOH's Response constitutes a wrongful denial of Plaintiff's IPRA Request, as DOH unreasonably failed to make *any* records available for inspection or copying, including records containing non-exempt information, such as the birth years of contestants.

13. IPRA provides that "[p]rotected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection." § 14-2-1.1 (2019).

14. IPRA defines "protected personal identifier information" as:

- (1) all but the last four digits of a:
 - (a) taxpayer identification number;
 - (b) financial account number; or
 - (c) driver's license number;
- (2) all but the year of a person's date of birth; and
- (3) a social security number[.]

§ 14-2-6(E) (2018).

15. The Response states that "protected personal identifiers . . . and protected health information have been redacted (in whole *or in part*, in accordance with IPRA) from the responsive materials, resulting in no materials being produced." **Exhibit B** (emphasis added).

16. However, it was improper for DOH to not produce *any* "responsive materials," as "[t]he presence of protected personal identifier information on a record does *not* exempt the record from inspection." § 14-2-1.1 (emphasis added).

17. To comply with IPRA, DOH should have made the "responsive materials" available for inspection, with any "protected personal identifiers" or "protected health information" properly redacted therefrom.

18. In particular, responsive materials containing the last four (4) digits of any taxpayer identification numbers, financial account numbers, and driver's license numbers, as well as those materials containing years of birth, should have been produced or otherwise made available for inspection by DOH, regardless of whether exempt information was redacted from such materials.

19. Moreover, years of birth (or any years for dates related to an individual), and the first three (3) digits of zip codes, are not considered "protected health information" under the Health Insurance Portability and Accountability Act and associated regulations ("HIPAA"). 45 C.F.R. § 164.514.

20. Likewise, HIPAA does not prohibit the production of records containing the last four (4) digits of taxpayer identification numbers, financial account numbers, or driver's license numbers.

21. Accordingly, DOH wrongfully denied Plaintiff's IPRA Request, thus entitling Plaintiff to judgment awarding actual damages, statutory damages, injunctive relief, costs and attorneys' fees, pursuant to Sections 14-2-11 and -12.

COUNT I:
STATUTORY DAMAGES PURSUANT TO SECTION 14-2-11

22. All of the foregoing allegations are incorporated herein by reference.

23. Plaintiff is entitled to statutory damages pursuant to IPRA Section 14-2-11 for Defendant's unreasonable failure to provide a complete and adequate response to Plaintiff's IPRA Request.

24. "Section 14-2-11 ensures prompt compliance by allowing for statutory damages of up to \$100 per day if a public body fails to timely respond to a records request." *Faber v. King*, 2015-NMSC-015, ¶ 31, 348 P.3d 173.

25. Section 14-2-11 damages are also applicable “when a public body provides an incomplete or inadequate response to a request to inspect public records[.]” *Britton v. Office of Attorney General*, 2019-NMCA-002, ¶ 33, 433 P.3d 320.

26. Damages shall “be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable.” § 14-2-11(C).

27. Damages for untimely compliance shall “not exceed \$100 per day” and shall accrue from the day the public body is in noncompliance until a written denial is issued. *Id.*

28. Plaintiff’s IPRA Request was made on July 19, 2022.

29. DOH has been in noncompliance with Section 14-2-11 since on or about August 3, 2022.

30. DOH unreasonably failed to comply with Section 14-2-11 by providing an incomplete and inadequate response to Plaintiff’s IPRA Request, entitling Plaintiff to statutory damages

**COUNT II:
INJUNCTIVE RELIEF, DAMAGES, COSTS AND
ATTORNEY’S FEES PURSUANT TO SECTION 14-2-12**

31. All of the foregoing allegations are incorporated herein by reference.

32. “[A] person whose written request has been denied[.]” may bring an action to enforce the Act. § 14-2-12(A).

33. “A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of [IPRA].” § 14-2-12(B).

34. “The court shall award damages, costs and reasonable attorneys’ fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of [IPRA].” § 14-2-12(D).

35. Plaintiff is entitled to an injunction requiring DOH to completely and adequately responds to its IPRA Request by producing or making available for inspection all non-exempt public records subject to the IPRA Request.

36. Plaintiff is entitled to its litigation costs and reasonable attorneys' fees in bringing this action to compel DOH's compliance with IPRA.

37. Plaintiff is also entitled to actual damages as a result of DOH's non-compliance with IPRA.

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiff respectfully requests the following relief:

A. An Order requiring Defendant DOH to permit inspection of all non-exempt public records subject to Plaintiff's IPRA Request;

B. An award of statutory damages of \$100 per day from August 3, 2022, until Defendant DOH permits inspection of all non-exempt public records subject to Plaintiff's IPRA Request;

C. An award of actual damages resulting from Defendant's non-compliance with IPRA;

D. An award of Plaintiff's costs and reasonable attorneys' fees; and

E. Any other relief this Court deems just and proper.

Respectfully submitted,

**ARAGON MOSS
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